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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT L. CLARKE,
COMPTROLLER OF THE CURRENCY,
Petitioner,

v.

SECURITIES INDUSTRY ASSOCIATION,
Respondent.

SECURITY PACIFIC NATIONAL BANK,
Petitioner,

v.

SECURITIES INDUSTRY ASSOCIATION,
Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE NEW YORK CLEARING HOUSE ASSOCIATION AS AMICUS CURIAE

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BRIEF OF THE NEW YORK CLEARING HOUSE ASSOCIATION AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The New York Clearing House Association (the "Clearing House") is an association of 12 leading commercial banks that are located in New York City.[1] It operates electronic payment

[1] The members of the Clearing House are The Bank of New York, The Chase Manhattan Bank, N.A., Citibank, N.A., Chemical Bank, Morgan Guaranty Trust Company, Manufacturers Hanover Trust Company, Irving Trust Company, Bankers Trust Company, Marine Midland Bank, N.A., United States Trust Company of New York, National Westminster Bank USA and European American Bank & Trust Company.

systems and clears commercial drafts and items in the New York area. In addition, it files briefs as amicus curiae in appeals that raise significant questions of banking law. The Clearing House appeared as amicus curiae before the Court of Appeals for the District of Columbia Circuit and the District Court for the District of Columbia in this action.

Members of the Clearing House have a direct and vital interest in the proper interpretation of Federal banking statutes such as the McFadden Act. The Clearing House believes that petitioner Comptroller of the Currency (the "Comptroller") properly exercised his authority under the Act in permitting petitioner Security Pacific National Bank to establish, and Union Planters National Bank to acquire, subsidiaries which provide discount brokerage services to the public at sites not limited to bank branches. The Clearing House further believes that the views presented in this brief will aid the Court in its consideration of the issues arising under the McFadden Act.

SUMMARY OF ARGUMENT

The Supreme Court should grant the petitions for certiorari submitted by the Comptroller of the Currency and Security Pacific National Bank because the decisions below (1) have the practical effect of substantially expanding the scope of the McFadden Act to constrain activities that may be, and long have been, conducted without locational restrictions; (2) construe the Act in a fashion that runs athwart the national policy in favor of competition and rules of statutory interpretation established by this Court; and (3) replace the statutory definition of "branch" with an open-ended definition inviting regulation-by-litigation at the instigation of virtually any enterprise perceiving itself to be adversely affected by competition with banks.

ARGUMENT

I

This case presents an issue of major importance to the banking industry and the national economy. For many decades national banks have engaged in two different types of activities: those activities that may be conducted only at bank headquarters or branches, and those that may be conducted at any location. The former category of activities, as specified by the McFadden Act, 12 U.S.C. § 36(f)(1982), consists of taking deposits, paying checks and lending money. The latter category includes a wide array of legitimate and useful activities that national banks have long conducted without locational constraint including, *inter alia*, trust account administration, credit card operations, loan production, and, more recently, securities brokerage. The distinction between these two categories has long been implemented by the Comptroller of the Currency,[2] relied on by banks, and acknowledged by Congress.[3]

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[2] *See* 12 C.F.R. §§ 5.30(a), 7.7380(b) (1985).

[3] The substantial, multistate, non-branch activity of national banks was expressly considered and relied upon by Congress during the three years of hearings leading to the passage in 1978 of the International Banking Act, Pub. L. No. 369, 92 Stat. 607, which amended the National Banking Act and other banking statutes to accommodate the activities of foreign banks. *See, e.g., Financial Institutions and the Nation's Economy: (FINE) Discussion Principles: Hearings Before the Subcommittee on Financial Institutions Supervision, Regulation and Insurance of the House Banking, Currency and Housing Committee*, Part 1, 94th Cong., 1st Sess. & 2nd Sess. 1245-1249 (1975); *id.*, Part 3 at 1834 (1976); *Foreign Bank Act of 1975: Hearing Before the Subcommittee on Financial Institutions of the Senate Committee on Banking, Housing and Urban Affairs*, 94th Cong., 2d Sess. 154-56, 234, 370-72, 433, 509-10 (1976); *International Banking Act of 1976: Hearings Before the Subcommittee on Financial Institutions of the Senate Committee on Banking, Housing and Urban Affairs*, 94th Cong., 2d Sess. 162-64, 169-70, 258-59 (1976); *International Banking Act of 1977: Hearings Before the Subcommittee on Financial Institutions Supervision, Regulation and Insurance of the House Committee on Banking, Finance and Urban Affairs*, 95th Cong., 1st Sess. 301, 311-33, 473-74, 556, 576, 607-08 (1977); *International Banking Act of 1978: Hearings Before the Subcommittee on Financial Institutions of the Senate Committee on Banking, Housing and Urban Affairs*, 95th Cong., 2d Sess. 99, 144, 198-200 (1978); *International Banking Act of 1978: Report of the Senate Committee on Banking, Housing, and Urban Affairs*, 95th Cong., 2d Sess. 8-11 (1978).

The decisions below are of grave consequence because they blur that well-settled distinction, threatening to swallow up the latter category into the former and raising serious doubt as to numerous bank operations long conducted at places other than bank headquarters and branch offices. The decisions below leave in disarray a long-standing statutory arrangement and will have a serious *in terrorem* effect on on-going activities. Moreover, in doing so, they adopt a rule of standing-to-sue that invites a torrent of litigation initiated not only by the intended beneficiaries of the McFadden Act (*i.e.*, other banks) but by any enterprise that can claim to be economically affected by any bank activity conducted at any place other than headquarters or branches.

The McFadden Act provides that any national bank may establish branch offices in the state in which it is located to the extent that "such establishment and operation are at the time authorized to State banks by the statute law of the State in question", 12 U.S.C. § 36(c)(2)(1982). Section 7(f) of the McFadden Act, 12 U.S.C. § 36(f)(1982), defines "branch" as follows:

> "The term 'branch' as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent."

At issue here is the proper scope of the definition of "branch".

The Comptroller determined that offices at which discount securities brokerage is conducted by banks are not, as such, bank branches within the meaning of the McFadden Act because they are not offices at which any of the three types of transactions specified by the Act—*i.e.*, receiving deposits, paying checks or lending money—occur.

The district court redefined the term "branch" to encompass any location conducting any activity "aimed at attracting and servicing customers conveniently", 577 F. Supp. 252, 260.

The court of appeals affirmed the ruling of the district court, by a 2-1 vote, in a two-sentence opinion, stating that it was in agreement with the result reached "generally for the reasons stated" by the district court. 758 F.2d 739, 740. Suggestion for rehearing *en banc* was denied, over the dissent of three judges, on July 12, 1985.

The district court rejected the Comptroller's "literal reading of the statute", 577 F. Supp. at 259, primarily on grounds that it was "contradicted . . . by the legislative history of the Act", *id.* This Court has recently cautioned, however, in a related context, that the banking statutes are to be read in accordance with their terms and that policy decisions to alter those terms should be left to Congress. *Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, 54 U.S.L.W. 4101 (U.S. January 22, 1986) (No. 84-1274). Moreover, the legislative history on which the district court relied was comprised entirely of one post-enactment statement by Representative McFadden. As this Court observed in *Dimension Financial,* matter extrinsic to the legislative debate, even when made a part of the formal record before Congress, "is not 'legislative history' in any meaningful sense of the term and cannot defeat the plain application of the words actually chosen by Congress to effectuate its will." *Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, 54 U.S.L.W. 4101, 4104 (U.S. January 22, 1986) (No. 84-1274); *see Regional Rail Reorganization Act Cases,* 419 U.S. 102, 132 (1974) ("post-passage remarks of legislators, however explicit, cannot serve to change the legislative intent of Congress expressed before the Act's passage").

In support of its position, the district court also cited a decision of this Court, *First National Bank in Plant City v. Dickinson,* 396 U.S. 122 (1969), and of the District of Columbia Circuit, *Independent Bankers Association of America v. Smith,* 534 F.2d 921 (D.C. Cir.), *cert. denied,* 429 U.S. 862 (1976). Those decisions, however, hold that certain off-premises banking facilities were bank branches precisely be-

cause they performed one of the three enumerated banking functions specified in Section 7(f) of the McFadden Act.[4]

II

This action is the most recent battle in a long campaign by the securities industry to insulate itself from competition with commercial banks. Despite that campaign, it is now finally established that national banks and bank affiliates may offer brokerage services to the public. *Securities Industry Association v. Comptroller of the Currency,* 758 F.2d 739 (D.C. Cir. 1985), *cert. denied,* 54 U.S.L.W. 3450 (U.S. January 13, 1986) (No. 85-392); *Securities Industry Association v. Board of Governors of the Federal Reserve System,* 104 S. Ct. 3003 (1984). Yet the decisions below largely emasculate the ability of national banks to engage effectively in that business.

Until 1975, brokerage commission and exchange membership rules severely impeded the ability of banks to execute customers' orders for listed securities. Those rules barred corporations, and thus all federally insured banks, from exchange membership, *see* 2 L. Loss, *Securities Regulation* 1172 n.8 (2d ed. 1961), and fixed the commissions to be charged by brokers who were exchange members, *see, e.g.,* New York Stock Exchange, Former Rule 383; SEC, *Report of Special Study of Securities Markets,* H.R. Doc. No. 95, 88th Cong., 1st Sess., pt. 2 at 295 (1963). As a result, banks—obliged to execute transactions in listed securities through

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[4] The district court also relied upon *St. Louis County National Bank v. Mercantile Trust Company National Association,* 548 F.2d 716 (8th Cir. 1976), *cert. denied,* 433 U.S. 909 (1977). We believe that the result reached in *St. Louis County* is mistaken for the reasons stated in the dissenting opinion therein, 548 F.2d at 720-22, and in *Continental Illinois National Bank & Trust Co. v. Lignoul,* No. 76-C-2209 (N.D. Ill. November 9, 1976). In any event, *St. Louis County* was an action by a state bank against a national bank, and the court there acknowledged and sought to serve the Congressional purpose of placing "national and state banks on a basis of 'competitive equality' ", 548 F.2d at 718, insofar as bank branching was concerned. The decisions below serve no such purpose.

exchange members who charged fixed commissions—were unable to offer brokerage services at competitive prices and did not aggressively promote their brokerage services.[5]

Banks began to expand their brokerage operations following the deregulation of brokerage commission, which became fully effective in 1975, *see* Securities Act Amendments of 1975, 15 U.S.C. § 78f(e)(1)(1982), and they have offered an increasing variety of brokerage and related services since then.[6] In response, the SIA urged the bank affiliates were excluded from engaging in discount brokerage activity by the Glass-Steagall Act, Pub. L. No. 66, 48 Stat. 162 (1933), and the Bank Holding Company Act, 12 U.S.C. §§ 1841 *et seq.* (1982). Those arguments were rejected by this Court in *Securities Industry Association v. Board of Governors of the Federal Reserve System,* 104 S. Ct. 3003 (1984). The SIA next argued, in this action, that the Glass-Steagall Act prohibits banks, as opposed to bank affiliates, from offering discount brokerage services to their customers. That position was rejected by the courts below. The SIA's petition for writ of certiorari on so much of the decisions below as held that the Glass-Steagall Act permits banks to engage in discount brokerage was denied by this Court on January 13, 1986. *Securities Industry Association v. Comptroller of the Currency,* 54 U.S.L.W. 3450 (U.S. January 13, 1986) (No. 85-392).

Denied protection from competition under the Bank Holding Company Act and the Glass-Steagall Act, the SIA sought shelter from competition under the branch banking provisions

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[5] Banks were in the business nonetheless. As this Court has recently recognized, banks "long have arranged the purchase and sale of securities as an accommodation to their customers" and they have in fact executed securities transactions in precisely the same manner as other brokers do. *Securities Industry Association v. Board of Governors of the Federal Reserve System,* 104 S. Ct. 3003, 3008 (1984).

[6] *See generally,* Clark & Saunders, *Glass-Steagall Revised: The Impact on Banks, Capital Markets and the Small Investor,* 97 Banking L.J. 811, 829-31 (1980); Note, *A Banker's Adventures in Brokerland: Looking Through Glass-Steagall at Discount Brokerage Services,* 81 Mich. L. Rev. 1498 (1983).

of the McFadden Act. Thus, the SIA urges that, if banks are permitted to engage in discount brokerage, they can only do so under the handicap of locational restrictions, so that competition in the brokerage business will be held to a minimum. In particular, the SIA urges that national banks can engage in discount brokerage of securities only at their headquarters and branch offices. That interpretation of the Act substantially and arbitrarily curtails the procompetitive effect of this Court's recent decision in *Securities Industry Association v. Board of Governors of the Federal Reserve System,* 104 S. Ct. 3003 (1984), and casts doubt upon a wide range of other activities long conducted by banks at locations other than their headquarters and branches.

We submit that the courts below fell into error by ignoring the fundamental national policy in favor of vigorous and unhampered competition. That policy is predicated upon the firm belief that the public benefits from competition and is disadvantaged by restraints on competition. As Congress long ago established, preserving the rule of competition *is* the declared public policy of the United States. 15 U.S.C. §§ 1-7 (1982). This Court has stated:

> "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise laid open to question, the policy unequivocally laid down by the Act is competition." *Northern Pacific Railway Co. v. United States,* 356 U.S. 1, 4 (1958).

Clear recognition of that policy has given rise to rules of statutory construction and interpretation that were entirely ignored by the courts below. As this Court has held, statutory

exceptions to the rule of competition must be both explicit and narrowly construed. *See United States v. National Association of Securities Dealers*, 422 U.S. 694, 719-20 (1975); *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 218 (1966); *United States v. Philadelphia National Bank*, 374 U.S. 321, 350-51 n.28 (1963).[7]

The courts below wholly disregarded this fundamental doctrine, finding in the McFadden Act competitive constraints neither intended nor expressed by Congress. Nowhere in the language of the Act are there to be found constraints of the sort here invoked. The plain language of the Act defines a "branch"—to which the locational restrictions of the Act apply—to

> "include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which *deposits are received, or checks paid, or money lent*", 12 U.S.C. § 36(f)(1982) (emphasis supplied).

Nothing in the language of the Act suggests that the locational restraints apply to offices, agencies or any other facility at which none of the three designated types of transactions occurs. Discount brokerage offices perform none of the enumerated functions, nor engage in activities even arguably akin to those functions.[8]

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[7] We fully recognize that, in some areas of the banking business, Congress has elected to sacrifice competition to other purposes. *Investment Company Institute v. Camp*, 401 U.S. 617, 635-36 (1971). But exceptions to the rule of competition are not to be read more broadly than required by the express language Congress adopted. *See Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 374 (1973).

[8] Indeed, the remoteness of discount brokerage from the fair intendment of the Act is demonstrated by the very cases on which the district court relied. In *First National Bank in Plant City v. Dickinson*, 396 U.S. 122 (1969), this Court found that off-premises depository facilities operated by a bank were bank branches because they performed functions substantially identical to the receiving of deposits "for all purposes contemplated by Congress", 396 U.S.

The purpose of the McFadden Act was to facilitate competition among state and national banks and not to restrain competition between banks and brokerage firms. Prior to the passage of the McFadden Act, a national bank was prohibited from conducting its banking business at any place other than the office specified in its certificate of organization. *First National Bank in St. Louis v. Missouri*, 263 U.S. 640 (1924). This placed national banks at a sharp disadvantage in competing with state-chartered banks in those states where branching was permitted. The McFadden Act redressed this competitive inequality by granting national banks the same branching privileges, if any, afforded to state banks by state law. *First National Bank in Plant City v. Dickinson*, 396 U.S. 122 (1969); *see* R. Westerfield, *Banking Principles and Practice* 249-51 (rev. ed. 1928).

There is no room for doubt as to the anticompetitive impact of the interpretation adopted below. As the district court expressly found:

> " . . . SIA has alleged that *its members' profits will suffer* if national banks are allowed to operate brokerage subsidiaries in competition with them. And it is obvious that the greater number of offices from which banks are allowed to conduct their brokerage business, *the greater will be the inroads the banks will be able to make* into the business of SIA's members." 577 F. Supp. at 258 (emphasis supplied).

Inroads can be made into "the business of SIA's members" only by attracting customers with competitive prices and services. But the salutary function of competition in our economy is

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at 137. Similarly, in *Independent Bankers Association of America v. Smith*, 534 F.2d 921 (D.C.Cir.), *cert. denied*, 429 U.S. 862 (1976), the court found that each of the three enumerated functions—receiving deposits, paying checks and making loans—were performed at the bank's customer-bank communications terminals, bringing the terminals within the statutory definition of a branch.

precisely that it affords choices to customers and thereby constrains profits by driving down prices and threatening the erosion of market shares.

The restriction of such competition as commercial banks may provide in the area of discount brokerage services should not be countenanced absent express Congressional proscription. The branching provisions of the McFadden Act clearly do not contain such a proscription, and the language of the Act should not be strained to provide one.

III

Disregarding the language and purpose of the Act, the ruling of the Comptroller, and well-established law on standing, the decisions below adopted an open-ended approach under which a wide array of bank activities could be challenged by virtually anyone claiming to be economically injured by bank activity. Eschewing "the Comptroller's literal reading of the statute", 577 F. Supp. at 259, the district court found the term "branch" to embrace not only any location "at which deposits are received, or checks paid, or money lent", 12 U.S.C. § 36(f)(1982), but more broadly, any location where a bank conducts any activity "aimed at attracting and servicing customers conveniently", 577 F. Supp. at 260. That holding would cast a cloud over a wide range of useful and legitimate activities. Many activities of banks, in addition to discount securities brokerage, are conducted away from the bank's headquarters and branches—for example, loan production, trust account administration, processing of consumer and commercial loans, and credit card operations. While such activities inevitably have as their ultimate object the servicing and convenience of customers, it has never been supposed that locations at which they are conducted are "branches". The indeterminate nature of the definition adopted below would create a regulatory mare's nest.

The problems generated by the open-ended definition of "branch" are exacerbated by the overbroad view of standing

adopted below. The decisions below endorse a rule of standing-to-sue that permits anyone to bring suit if aggrieved by "the scope of national banks' activities", 577 F. Supp. at 258. That rule is inconsistent with prior decisions of this Court. *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982), *quoting Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 153 (1970). Moreover, it constitutes an invitation issued to anyone and everyone with a pecuniary interest in obstructing bank operations. The response to that invitation may reasonably be expected to overwhelm the systematic regulation of bank branching by the Comptroller envisioned by Congress. Banks will be confronted with the prospect of persistent uncertainty as to the legitimacy of their activities. The quest for protection from bank competition by parties who were never intended by Congress to enjoy any shelter under the McFadden Act will have a significant *in terrorem* effect on perfectly legitimate economic activities while gratuitously burdening both banks and the courts.

The indeterminate redefinition of "branch" adopted by the courts below is inconsistent with the plain meaning and the legislative history of the McFadden Act and cannot be justified by either the post-enactment statements of Representative McFadden or the decisions cited by the courts below. It is, nonetheless, only a foretaste of a long and unhappy campaign of regulation-by-litigation if the decisions below are allowed to stand.

CONCLUSION

Nothing in the McFadden Act warrants the judicial reconstruction of the statutory definition of a "branch" undertaken by the courts below. Nothing in the McFadden Act requires the protection of the business of the SIA membership from competitive "inroads". For the reasons stated above, the petitions for writs of certiorari should be granted.

Respectfully submitted,

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